Morgan Lewis

Robert A. Brundage
Of Counsel
+1.415.442.1243
robert.brundage@morganlewis.com

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VIA E-MAIL, FACSIMILE AND OVERNIGHT

Sharon L. Anderson, Esq.
County Counsel
Office of the County Counsel, Contra Costa County
651 Pine Street, Ninth Floor
Martinez, CA 94553

Re: Application of Honorable Danielle Douglas For Appointment as Interim District Attorney

Dear Ms. Anderson:

On behalf of the Honorable Danielle Douglas, we are pleased to respond to your letter of August 1, 2017. Your letter requests a written analysis of whether and how California Constitution Article VI, Section 17, applies to Judge Douglas's application for appointment for the interim District Attorney position. As detailed below, Section 17 would preclude Judge Douglas from being formally appointed as interim District Attorney if she continued to sit as a superior-court judge. However, the Court of Appeal has held that if a judge resigns her judgeship, Section 17 ceases to apply and the former judge may immediately commence a non-judicial public office. If Judge Douglas resigns as a judge and the Board of Supervisors then formally votes to appoint her as interim District Attorney, Section 17 will pose no barrier to the appointment.

Article VI, Section 17.

Article VI, Section 17 ("Section 17") provides, as relevant here:

> A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office …. A judge of a trial court of record may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge.

Cal. Const., art. VI, § 17.

Factual Background

Judge Douglas is a judge on the Contra Costa County Superior Court. After being initially

Morgan, Lewis & Bockius LLP

One Market
Spear Street Tower
San Francisco, CA 94105-1596
United States
T +1.415.442.1000
F +1.415.442.1001

appointed to fill a vacancy, she ran unopposed for the Superior Court judgeship in the June 2016 primary election, and so was automatically elected in the November 2016 general election. *See* Elec. Code § 8203(c). Her current term commenced in January 2017. *See* Cal. Const., art. VI, § 16(c) (providing that a superior court judge's term begins the Monday after January 1 following the election). The Superior Court is a court of record. Cal. Const., art. VI, § 1. Therefore, Judge Douglas is a "judge of a court of record" under Section 17. Judge Douglas is currently on a voluntary leave of absence without pay while the Board considers her application to be appointed interim District Attorney.

Judge Douglas Will Be Eligible For Appointment As Interim District Attorney If She Resigns Her Judgeship Before Being Formally Appointed.

Under Article VI, Section 17, Judge Douglas will be eligible if she resigns her judgeship before being formally appointed as interim District Attorney.

1. A Judge Who Resigns Is Immediately Eligible For Non-Judicial Public Office.

Gilbert v. Chiang (2014) 227 Cal.App.4th 537 is right on point. There, the Court of Appeal unanimously held that a judge who resigns is immediately eligible for other public employment or office.

In *Gilbert,* an appellate justice sued the State Controller to obtain a determination that Section 17 would not make him ineligible for other public office or public employment if he resigned from his judicial office before the completion of his term. 227 Cal.App.4th at 540. The Court of Appeal held that if he resigned, Section 17 would no longer make him ineligible and he could immediately commence other public employment or office. It explained that Section 17 only applies to "sitting judges," not judges who have resigned, because only sitting judges are judges of a court of record:

> Section 17 prohibits only "a judge of a court of record" from engaging in specified conduct and renders only such a judge "ineligible" for nonjudicial public employment or public office "during the term for which the judge was selected." [Citation] But, as the Controller concedes, a person who has retired or resigned from a judicial office no longer qualifies as "a judge of a court of record." Therefore, a person who has resigned or retired from judicial office would no longer be governed by Section 17. By its own terms, Section 17 applies only to sitting judges.

227 Cal.App.4th at 540-41. The State Controller in *Gilbert,* represented by the Attorney General, agreed that "once a person has retired or resigned from a judicial office, he or she does not qualify as 'a judge of a court of record' for purposes of Section 17." 227 Cal.App.4th at 539, 545.

The Court of Appeal held that once a judge has resigned from her judgeship, Section 17 does not make her ineligible for other public office, regardless of whether she resigned before the end of her term: "Because Section 17 applies only to sitting judges and not to persons who have resigned or retired from a judicial office, it does not prohibit such persons from holding other public office or engaging in other public employment, without regard to whether any time remains in the judicial 'term' for which that person had been previously selected." 227 Cal.App.4th at 541.

As a result, *Gilbert* explained, a judge who has resigned may "immediately" commence another public office: "Because the disputed provision of Section 17 renders only 'a judge of a court of

record' ineligible for other public office or public employment, and that phrase refers only to a sitting judge, we conclude this provision is unambiguous on its face…. [Section 17] does not prohibit any person who has resigned or retired from a judicial office … from immediately commencing public service in another capacity. Stated another way, Section 17 's prohibition against judges serving in other public capacities is inapplicable to *former* judges." 227 Cal.App.4th at 546.

The Court of Appeal reversed and remanded to the trial court with directions to "enter a new judgment declaring Section 17 does not prohibit [the plaintiff justice] from commencing other public office or public employment immediately following his resignation or retirement from judicial office, even if that resignation or retirement occurs before the end of his current judicial term." 227 Cal.App.4th at 552-53.

Gilbert applies here in a straightforward way. If Judge Douglas "resign[s] … from judicial office," she will "no longer be governed by Section 17" and it will "not prohibit" her from "immediately commencing public service in another capacity," including "other public office." 227 Cal.App.4th at 541, 546, 552-53.

Gilbert is binding precedent in trial courts throughout California. "Decisions of every division of the District Courts of Appeal are binding … upon all the superior courts of this state…." *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.[1] For example, the Supreme Court held in *Hale v. Superior Court of the City and County of San Francisco* (1975) 15 Cal.3d 221 that a trial court in San Francisco "clearly exceeded its jurisdiction" by refusing to follow a Court of Appeal precedent from the Fourth Appellate District in San Diego. 15 Cal.3d at 229 fn.3 (trial court clearly exceeded jurisdiction by refusing to follow *Chambers v. Municipal Court* (1974) 43 Cal.App.3d 809, a decision of the Fourth District); *see* Gov. Code § 69100 (specifying geographic jurisdiction of Court of Appeal districts).

Thus, if Judge Douglas resigns and is then appointed interim District Attorney, a trial court would be bound to follow *Gilbert* and uphold her appointment.

Indeed, in the wake of *Gilbert* another Bay Area county appointed a recently-resigned judge to a public office. In 2016, Justice Miguel Márquez resigned from the Court of Appeal to become Santa Clara County's chief operating officer. *See* "Appellate Justice Miguel Marquez to Become Santa Clara County COO," Aug. 3, 2016, http://www.mercurynews.com/2016/08/03/appellate-justice-miguel-marquez-to-become-santa-clara-county-coo/ (describing Section 17 and *Gilbert*'s holding, and explaining that former Justice Márquez "resigned before taking the new job").

b. The 1980s-Era Attorney General Opinions Have Been Superseded By Court of Appeal Decisions And The Attorney General's Concession That A Judge Who Resigns Does Not Qualify As A Judge Of A Court of Record.

As your August 1 letter points out, the California Attorney General opined on the meaning and purpose of Section 17 in the 1980s. One of these opinions concluded that a superior-court judge who resigned the judgeship would be ineligible for appointment to another public office until expiration of the rest of the judge's original term. Opinion No. 83-607, 66 Ops. Cal. Atty. Gen. 440 (1983). Based on that opinion, a subsequent Attorney General opinion concluded that a Supreme

[1] The *Auto Equity* principle does not apply when appellate decisions conflict. 57 Cal.2d at 456. No appellate decision conflicts with *Gilbert* on this holding.

Court justice who resigned would remain ineligible for public employment. Opinion No. 83-1203, 67 Ops. Cal. Atty. Gen. 149 (1984). The Attorney General opinions are incorrect. Their reasoning was rejected by the Court of Appeal's opinions in *Gilbert* and *Lungren v. Davis* (1991) 234 Cal.App.3d 806, and they overlook a critical point later conceded by the Attorney General. We focus mainly on the Attorney General's 1983 opinion, 66 Ops. Cal. Atty. Gen. 440, which sets out the Attorney General's analysis on this point.[2]

As background, opinions of the Attorney General, while entitled to great weight, are not binding authority. *Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 66; *People v. Garth* (1991) 234 Cal.App.3d 1797, 1800. The Attorney General agrees that his opinions "are advisory, and not legally binding on courts, agencies, or individuals." https://oag.ca.gov/opinions/faqs (Frequently Asked Question No. 9).

The Attorney General's analysis in the 1980's has not stood the test of time. The core of the Attorney General's argument was that Section 17 makes a judge ineligible for non-judicial employment for the "the term for which the judge was selected." The Attorney General opinion concluded that the word "term" referred to the entire term for which the judge was originally selected, not how long the judge in fact served. *See* 66 Ops. Cal. Atty. Gen. at 441-443.

Gilbert and *Lungren* reject this argument. *Gilbert* explains that a person must *also* be a "judge of a court of record" to be ineligible under Section 17. Both parties and the court agreed that "once a person has retired or resigned from a judicial office, he or she *does not qualify* as a 'judge of a court of record' for purposes of Section 17." 227 Cal.App.4th at 545. Even the Controller, represented by the Attorney General, agreed. 227 Cal.App.4th at 541, 545; *see id.* at 539 (defendant and respondent Controller was represented by Attorney General). Since a judge who has resigned is not a judge of a court of record, he or she is not within Section 17.

That cannot be changed by debating the meaning of the word "term," as *Gilbert* explains. "[O]nce we acknowledge Section 17, on its face, applies only to 'judge[s] of court[s] of record,' any additional language which suggests persons whom we agree do not fall within that group are nonetheless implicitly bound by the provision, would merely *create ambiguity*." 227 Cal.App.4th at 546. Any such ambiguity would have to be resolved in favor of allowing a person to seek office, as both *Gilbert* and *Lungren* explain. *Gilbert,* 227 Cal.App.4th at 544, 546; *Lungren,* 234 Cal.App.3d at 830. Moreover, in the end, *Gilbert* holds that Section 17's dispositive language is "unambiguous": it applies only to judges of courts of record, and that phrase refers "only to a *sitting* judge." 227 Cal.App.4th at 546.

The 1983 Attorney General opinion does not address whether a person who has resigned as a judge qualifies as a judge of a court of record. Nor do the other 1980s Attorney General opinions. Indeed, from all that appears, the Attorney General had overlooked the point until *Gilbert*. *Gilbert* states that the parties' briefs focused primarily on the meaning of Section 17's phrase "the term for which the judge was selected." 227 Cal.App.4th at 545. The Court of Appeal and a friend-of-the-court brief raised the "different question" whether a judge who has resigned or retired qualifies as a judge of a court of record for purposes of Section 17. 227 Cal.App.4th at 545. The Controller, represented by the Attorney General, then conceded that a judge who has resigned "does not

[2] The other 1980s-era Attorney General opinions conclude that a person who has resigned as a judge can run for federal office and a sitting judge can become a county law library trustee. 67 Ops. Cal. Atty. Gen. 41 (1984); 67 Ops. Cal. Atty. Gen. 385 (1984). They do not add to the Attorney General's analysis relevant here, and we do not address them further.

qualify" as a judge of a court of record for purposes of Section 17. 227 Cal.App.4th at 545, 539. Since Section 17 only covers judges of courts of record, this point is critical. The 1983 Attorney General opinion's failure to appreciate this point makes the opinion unpersuasive, especially in light of the Attorney General's later concession and the Court of Appeal's later holding in *Gilbert*.

Both *Gilbert* and *Lungren* also point out other problems with the Attorney General's analysis.[3] The 1983 Attorney General opinion concluded that the phrase "during the term for which the judge was selected" meant that even if a judge resigns, she remains ineligible for the entire length of her original term. 66 Ops. Cal. Atty. Gen. at 441-43. *Gilbert* and *Lungren* both hold that this phrase does not bear the weight the Attorney General would put on it. Both hold that it merely distinguishes permanent judges (who serve terms for which they had been selected) from temporary judges (who have not been selected to serve any term and are merely appointed to fill vacancies). *See Gilbert,* 227 Cal.App.4th at 546-47 (describing and agreeing with *Lungren* on this point); *Lungren,* 234 Cal.App.3d at 825-28. *Lungren* holds that the 1983 Attorney General opinion "took a wrong turn at the starting line" in concluding that the word "term" relates to the fixed term of office. 234 Cal.App.3d at 820 fn.9.

Gilbert also explains that the Attorney General misunderstood the significance of Section 17's drafting history. The 1983 Attorney General opinion cited staff notes and similar materials of the Constitutional Revision Commission, suggesting that allowing judges to be eligible for appointment or election to other office was deleted as "detrimental to the administration of justice," eliminating "the possibility of an appointment in return for a decision." 66 Ops. Cal. Atty. Gen. at 445-46. As *Gilbert* points out, this concern only applies to *sitting* judges. 227 Cal.App.4th at 548. Further, a constitutional provision is interpreted according to the "intent of those who enacted it" – the voters. 227 Cal.App.4th at 543-44. "[T]here is no indication those staff notes [cited by the Attorney General] were ever shared with the voters, and thus no basis to infer the concerns expressed could have played any part in determining what the *voters* intended this revised version of Section 17 to accomplish." 227 Cal.App.4th at 548.

Further still, *Gilbert* disposed of the Attorney General's argument that Section 17 must cover judges who have resigned to prevent judges from "trading a judicial decision for a government position." 227 Cal.App.4th at 549; *compare* 66 Ops. Cal. Atty. Gen. at 445-46 (asserting that Section 17 was adopted partly to prevent "the possibility of decisions being rendered in return for appointments to public office or public employment."). *Gilbert* explained that this purpose does not require judges to be ineligible for public office after resigning. Numerous other laws already prohibit judges from trading judicial favors for government positions. They include the canons of judicial ethics, the Code of Civil Procedure's recusal provisions, the Commission on Judicial Performance – and the Penal Code sections making it a felony to receive a bribe or unauthorized gratuity. 227 Cal.App.4th at 549.

To the contrary, *Gilbert* holds that the policies behind Section 17 do not support applying it to judges who have resigned. The California Supreme Court held that the policy behind Section 17's predecessor was "'to conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.' In other words, it is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise

[3] *Gilbert* addresses arguments the Attorney General, representing the State Controller, made in the *Gilbert* litigation. The arguments are similar to those the Attorney General had made in the 1983 opinion.

of their judicial functions." *Abbott v. McNutt* (1933) 218 Cal. 225, 229 (further citation omitted). Conserving judges' time for their work applies only to sitting judges. *Gilbert* holds that preventing entanglements with other branches of government is also a "very important and worthy goal, but one which logically applies *only to the judiciary*. It would serve no purpose to extend these restrictions to persons who have resigned or retired from judicial office and thus no longer perform any judicial functions." 227 Cal.App.4th at 550.

Last, *Gilbert* explained that the contrary reading would yield absurd results. For example, "If the phrase 'a judge of a court of record' were construed to include persons who had resigned or retired from the judiciary, then the first clause of Section 17, which states '[a] judge of a court of record may not practice law,' would prohibit such a person from thereafter practicing law." 227 Cal.App.4th at 545. Even the Controller (still represented by the Attorney General) agreed that could not be right. 227 Cal.App.4th at 545. Similarly, Article VI section 19 requires the Legislature to prescribe compensation for judges of courts of record. If judges who have resigned were interpreted to remain judges of courts of record, they would nonsensically be "entitled to continued compensation." 227 Cal.App.4th at 545. Further, if Section 17 applied to persons who had resigned as judges, then different former judges would have different periods of ineligibility for non-judicial office, in a "distressingly uneven and at times wholly ineffective way." 227 Cal.App.4th at 548. Depending on when in their 12-year terms they resigned, some former appellate justices would be ineligible for public office "for a decade or more" while others would almost immediately be eligible for public office after resigning. 227 Cal.App.4th at 548-49. "Such an interpretation is senseless," it failed to advance the anticorruption policy that the Attorney General and Controller claimed was behind Section 17, and "[t]here is simply no reason for the different treatment." 227 Cal.App.4th at 548-49, 552.

In short, the Attorney General's 1983 opinion is outdated and non-binding. It overlooked the dispositive point, and did not have the benefit of the Court of Appeal's analysis and the Attorney General's concession in *Gilbert*. Its arguments have been rejected by both *Gilbert* and *Lungren.* Under Section 17's unambiguous text and *Gilbert*'s direct holding, a person who has resigned her judgeship is not a judge of a court of record, is therefore not rendered ineligible by Section 17, and after resigning her judgeship may immediately commence other public employment or office.

c. Judge Douglas Must Resign Before The Board Formally Appoints Her.

The discussion above makes clear that if Judge Douglas resigns her judgeship, she will immediately be eligible to commence non-judicial public office, including as interim District Attorney. Your letter asks at what stage Judge Douglas would have to resign. She would have to resign before the Board of Supervisors formally appoints her as interim District Attorney. Below, we suggest a simple way to accomplish this.

In the setting of elective office, the Supreme Court has interpreted the word "eligible" to mean the candidate must meet the eligibility requirements at the time of the election. "In this state … it has long been the law that a candidate, to be 'eligible' … must be qualified at the time of election; the word 'eligible' means 'capable of being chosen-the subject of selection or choice.'" *Samuels v. Hite* (1950) 35 Cal.2d 115, 116 (citation omitted); *Searcy v. Grow* (1860) 15 Cal. 117, 121. *See also* 66 Ops. Cal. Atty. Gen. at 441 ("Since 'eligible' means 'capable of being chosen—the subject of selection or choice' … the word 'ineligible' in the context of article VI, section 17, means *in*capable of being chosen or being the subject of selection or choice.") (partly quoting *Samuels,* 35 Cal.2d at 116). By the same reasoning, a candidate for appointive office must be eligible at the time of the appointment. A person is "chosen" for appointive office when she is appointed, just as a person is chosen for elective office when she is elected.

We have not found any precedent explaining at what stage the candidate should be deemed appointed for this purpose. To avoid uncertainty, Judge Douglas should resign from her judgeship before the Board of Supervisors formally votes to appoint her as interim District Attorney. The Supreme Court in *Searcy* held that the candidate must be eligible for the office at the time the votes electing him were cast, because those votes gave him the claim to the office and at that point the voters' power was "exhausted," *i.e.* no further action of the voters was needed. 15 Cal. at 121. By analogy here, eligibility to be appointed arguably means that the candidate must be eligible at the time the Board formally votes to appoint her, such that no further vote of the Board is needed before she can take office. This formal vote gives her the claim to the office and is analogous to the elections in *Samuels* and *Searcy*. *See* Gov. Code § 25304 ("The board of supervisors shall fill by appointment all vacancies that occur in … elective county officers," with exceptions not relevant here). Thus, Judge Douglas should resign before the Board's formal vote to appoint her.

If the Board is inclined to select Judge Douglas after the interviews on September 12, we suggest that the Board indicate this inclination, but provide time for Judge Douglas to resign before the formal vote is taken. Depending on the Board's wishes, the Board could do so in either of the following ways:

- Indicate on September 12 that it is inclined to choose Judge Douglas, and schedule the formal appointment vote for September 19 so she can resign in the interim; or

- Indicate on September 12 that it is inclined to choose Judge Douglas; take a short recess or move to other business while Judge Douglas submits a resignation letter; once she has submitted her resignation, formally vote to appoint her. All of this could take place on September 12.

Judge Douglas need not resign her judgeship merely to be considered for the interim District Attorney position. Eligibility means capability of being "chosen," 35 Cal.2d at 116, not capability of being *considered*. *Gilbert* supports this conclusion. "Section 17 does not prohibit any person who has resigned or retired from a judicial office … from *immediately commencing* public service in another capacity," and "does not prohibit [plaintiff judge] from commencing other public office … immediately following his resignation from judicial office …." 227 Cal.App.4th at 546, 552-53 (emphasis added). Judge Douglas obviously would not "commence" office as interim District Attorney before she is even appointed. The earliest she might be said to commence office as interim District Attorney is when she is formally appointed. Under *Gilbert,* she may commence immediately after resigning her judgeship.

Conclusion

Under Section 17's unambiguous language and the Court of Appeal's controlling precedent in *Gilbert*, if Judge Douglas resigns her judgeship, she will no longer be a "judge of a court of record" under Section 17 and will be immediately eligible for appointment as interim District Attorney.

Sincerely,

Robert A. Brundage

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RAB

cc: David Twa, County Administrator
Hon. Danielle Douglas